

1 MICHAEL A. SHERMAN (SBN 94783)

masherman@stubbsalderton.com

2 JEFFREY F. GERSH (SBN 87124)

jgersh@stubbsalderton.com

3 SANDEEP SETH (SBN 195914)

sseth@ stubbsalderton.com

4 WESLEY W. MONROE (SBN 149211)

wmonroe@stubbsalderton.com

5 STANLEY H. THOMPSON, JR. (SBN 198825)

sthompson@stubbsalderton.com

6 VIVIANA B. HEDRICK (SBN 239359)

vhedrick@stubbsalderton.com

7 STUBBS ALDERTON MARKILES, LLP

15260 Ventura Boulevard, 20TH Floor

8 Sherman Oaks, CA 91403

Telephone: (818) 444-4500

9 Facsimile: (818) 444-4520

10 Attorneys for PERSONALWEB

TECHNOLOGIES, LLC

J. DAVID HADDEN (CSB No. 176148)

dhadden@fenwick.com

SAINA S. SHAMILOV (CSB No. 215636)

sshamilov@fenwick.com

MELANIE L. MAYER (admitted *pro hac vice*)

mmayer@fenwick.com

TODD R. GREGORIAN (CSB No. 236096)

tgregorian@fenwick.com

RAVI R. RANGANATH (CSB No. 272981)

rranganath@fenwick.com

SHANNON E. TURNER (CSB No. 310121)

sturner@fenwick.com

CHIEH TUNG (CSB No. 318963)

ctung@fenwick.com

FENWICK & WEST LLP

Silicon Valley Center

801 California Street

Mountain View, CA 94041

Telephone: 650.988.8500

Facsimile: 650.938.5200

Counsel for Defendant

TWITCH INTERACTIVE, INC.

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 SAN JOSE DIVISION

16 IN RE PERSONAL WEB TECHNOLOGIES,
17 LLC, ET AL., PATENT LITIGATION

CASE NO.: 5:18-MD-02834-BLF-SVK

18 PERSONALWEB TECHNOLOGIES, LLC, a
19 Texas limited liability company, and
20 LEVEL 3 COMMUNICATIONS, LLC, a
21 Delaware limited liability company
22 Plaintiffs,

CASE NO.: 5:18-CV-05619-BLF-SVK

**JOINT STATEMENT REGARDING
PERSONALWEB TECHNOLOGIES,
LLC.'S MOTION TO COMPEL TWITCH
INTERACTIVE, INC. TO PROVIDE
FURTHER SUPPLEMENTAL
RESPONSES TO REQUESTS FOR
PRODUCTION OF DOCUMENTS**

21 v.

22 TWITCH INTERACTIVE, INC. a Delaware
23 corporation,

Defendant.

Trial Date: March 16, 2020

1 **I. PERSONALWEB'S STATEMENT**

2 This case against Twitch is directed to HTTP caching using content-based identifiers.
 3 PersonalWeb accuses Twitch of using HTTP cache control headers such as max-age value and content-
 4 based ETags, in conjunction with other aspects of the HTTP protocol, to carry out the claimed method
 5 of controlling distribution of its webpage content to invalidate and revalidate the access rights of
 6 browsers. (See, e.g., FAC, Dkt. 13 at ¶¶ 42-52.) PersonalWeb is entitled to information regarding all
 7 the benefits to Twitch¹ of using the accused HTTP cache control method to calculate damages.
 8 Nevertheless, Twitch has refused to provide data regarding infrastructure cost savings from its use of
 9 HTTP caching, data relating to lower web-page load times due to caching, or data relating to revenue
 10 increase or user-base increase through HTTP caching as a result of lower load times, despite repeated
 11 requests for the same, necessitating the Court's intervention. This information is relevant to damages
 12 because the benefits from Twitch's practice of HTTP cache control using content-based identifiers are
 13 factors to be considered under a Georgia-Pacific damages analysis. All of the documents sought in this
 14 motion to compel bear on these issues. Fact discovery closed on August 16, 2019. (Dkt. 491) The
 15 parties have met and conferred on these topics several times, most recently on August 19, 2019. The
 16 requests are attached as **Exhibits 1-3**.

17 **Documents regarding infrastructure cost savings from caching, lower web-page load**
 18 **times from caching, or revenue increase or user-base increase through caching as a result of lower**
 19 **load times.** Twitch has refused to produce these documents that are necessary for PersonalWeb's
 20 damages calculations. Twitch has not produced any of the following:

- 21 • web analytics reflecting user tracking, web traffic, page loads, page load time, impressions
 22 or ad loads, daily active sessions, and average page load time (RFPs 8, 12, 13, 14, 17, 33,
 23 34, 77, 78, 89, 110, 111);
- 24 • web analytics reflecting number of users versus load time, revenue versus load time, or ad
 25 impressions versus load time (RFPs 8, 12, 13, 14, 17, 33, 34, 77, 78, 89, 110, 111);
- 26 • monitoring and tracking reports of impressions/time, session time/time, load time/time,
 27

28 ¹PersonalWeb is no longer pursuing its counterclaims against AWS on the basis of discovery and the Court's Claim Construction (Dkt. 485) and is working on a stipulation to a final judgment.

revenue/time, and number of users/time (RFPs 8, 12, 13, 14, 17, 33, 34, 77, 78, 89, 110, 111).

- native QuickBooks or NetSuite files from 2011-2019 (Mr. Cellini, Twitch’s financial witness, testified he could have run these reports, but did not.) (requested in at least RFPs 7, 16, and 26);
- a cost report listing vendors and transactions, particularly as they relate to infrastructure and bandwidth costs in the “tech service cost” COGS category (Mr. Cellini also testified he could have run this report, but did not.) (RFPs 12, 16, 26, 72, 112);
- other documents that show the costs to transfer data to browsers or cost savings from caching (RFPs 12, 28, 33, 34, 43, 45, 62, 72, 112);
- documents, web logs, user logs that reflect the number of HTTP 200 and 304 messages or data consumed thereto (RFPs 8, 78, 84, 85, 86, 93, 115); and
- documents regarding comparisons made between using HTTP cache control using Content-Based ETags or Fingerprints, as compared to any other forms of cache-control (RFP 98).

These metrics directly impact the Georgia-Pacific factors relating to the profitability, utility, and advantages of the patented technology over alternative solutions. They also directly prove the value and benefits to Twitch of using the patented technology. PersonalWeb would be unable to complete a damages estimate that reflects all of the value of the patent without access to these documents, therefore, the Court should compel their production.

II. TWITCH’S STATEMENT

PersonalWeb’s request for what it contends are infrastructure-related documents is an improper and belated attempt to serve document requests past the close of fact discovery. PersonalWeb could have—but did not—serve document requests for the broad categories of documents sought above. Instead, PersonalWeb waited until the eleventh hour to seek these documents under the guise that they are responsive to previously served requests. But the RFPs referenced in PersonalWeb’s bullet points 1-6 above do not support the categories of documents requested here. And even to the extent that these new categories of documents could conceivably fall within a previously served document request, the information sought is irrelevant and grossly out of

1 proportion to any need in the case. Further, Twitch has confirmed that it does not have or has already
 2 produced or agreed to produce documents responsive to bullet points 5, 7, and 8 above.

3 As an initial matter, Twitch has already confirmed that it does not have documents in its
 4 possession, custody, or control that reflect the number of HTTP 200 and 304 messages or data
 5 consumed thereto from the relevant time period. PersonalWeb’s insistence on seeking the Court’s
 6 intervention despite Twitch’s representation that no such documents exist is nothing more than an
 7 attempt to drive up Twitch’s litigation costs. Moreover, to the extent that any “documents regarding
 8 comparisons made between using HTTP cache control using Content-Based ETags or Fingerprints, as
 9 compared to any other forms of cache-control” exist in Twitch’s possession, custody, or control,
 10 Twitch has already produced such documents. Twitch cannot produce additional documents it does
 11 not have. *Littlefield v. NutriBullet, L.L.C.*, No. CV 16-6894 MWF (SSX), 2017 WL 10439692, at *3
 12 (C.D. Cal. Dec. 20, 2017) (“[T]he court cannot order a party to produce documents that do not exist.
 13 A mere suspicion that additional documents must exist is an insufficient basis to grant
 14 a motion to compel.”).

15 Next, PersonalWeb seeks broad categories of metrics, including web analytics reflecting user
 16 tracking, web traffic, page loads, page load time, impressions or ad loads, daily active sessions,
 17 average page load time, number of users versus load time, revenue versus load time, or ad
 18 impressions versus load time, and monitoring and tracking reports of impressions/time, session
 19 time/time, load time/time, revenue/time, and number of users/time. But none of the RFPs
 20 PersonalWeb cites request these metrics. The only request that could conceivably cover a portion of
 21 any of these metrics is RFP 8, which seeks documents summarizing Twitch’s “volume of website
 22 data traffic in terms of the number of HTTP messages, number of bytes, or both, sent with Content-
 23 Based ETags and/or Fingerprints during the Relevant Time Period.” Twitch, however, does not have
 24 documents in its possession, custody, or control that reflect the volume of website data traffic sent
 25 with content-based ETags or fingerprints during the relevant time period—which it stated in its
 26 response to RFP 8. To the extent PersonalWeb seeks metrics unrelated to Twitch’s use of content-
 27 based ETags or fingerprints, PersonalWeb has propounded no document requests seeking this
 28 information. Regardless, PersonalWeb’s requests for broad website metrics untethered to the accused

1 functionality of the twitch.tv website—namely, the use of content-based ETags or fingerprints—are
 2 not relevant to any claim or defense in this action and are not proportional to the needs of the case.

3 Likewise, PersonalWeb’s request for “native QuickBooks or NetSuite files from 2011-2019”
 4 goes well beyond the scope of permissible discovery and is unduly intrusive. Because the patents-in-
 5 suit expired in 2016, Twitch provided PersonalWeb with its financial statements for the relevant time
 6 period of 2012-2016. Twitch has also provided a report of the transactions underlying the “tech
 7 service cost” expenses reflected in Twitch’s financial statements for 2015-2016 and will produce the
 8 same data for 2012-2014, to the extent such a report can be run for that time period. Twitch’s
 9 financial data outside of the 2012-2016 time period, particularly after the patents expired, is not
 10 relevant at all. PersonalWeb has not identified any financial information it seeks that Twitch has not
 11 otherwise provided or agreed to provide. Instead, PersonalWeb is asking for access to Twitch’s
 12 highly sensitive financial files as a fishing expedition. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072
 13 (9th Cir. 2004) (citation omitted) (“District courts need not condone the use of discovery to engage in
 14 ‘fishing expedition[s].’”).

15 Finally, PersonalWeb seeks “other documents that show the costs to transfer data to browsers
 16 or cost savings from caching.” Twitch’s financial statements and its technical service cost
 17 transactions provide all of the information necessary for PersonalWeb to ascertain “the costs to
 18 transfer data to browsers.” And, to the extent documents concerning “cost savings from caching”
 19 exist in Twitch’s possession, custody, or control, Twitch has produced such documents. Again,
 20 PersonalWeb does not articulate any basis for compelling Twitch to produce additional documents
 21 outside of what Twitch has already agreed to provide.

22
 23 Dated: August 23, 2019

STUBBS, ALDERTON & MARKILES, LLP

25 By: /s/ Sandeep Seth

Michael A. Sherman

Jeffrey F. Gersh

Sandeep Seth

Wesley W. Monroe

Stanley H. Thompson

Viviana Boero Hedrick

Attorneys for PERSONALWEB

TECHNOLOGIES, LLC

1 Dated: August 23, 2019

MACEIKO IP

2 Theodore S. Maceiko (SBN 150211)

3 ted@maceikoip.com

4 MACEIKO IP

420 2nd Street

5 Manhattan Beach, CA 90266

6 Telephone: (310) 545-3311

Facsimile: (310) 545-3344

7 Attorneys for Plaintiff

8 PERSONALWEB TECHNOLOGIES, LLC, a

Texas limited liability company

9
10 Dated: August 23, 2019

FENWICK & WEST LLP

11 By: /s/ Melanie L. Mayer

12 Melanie L. Mayer

13 Attorneys for TWITCH INTERACTIVE, INC.